IGNATIUS P. DAIM

v.

SYKT. PEMBORONG WILLIE SDN. BHD.

HIGH COURT BORNEO, KOTA KINABALU
WAN MOHAMED J
[CIVIL SUIT NO. K675 OF 1980]
6 JULY 1982

CIVIL PROCEDURE: *Claim for breach of contract - Statement of defence and counter - Claim filed - Failure to file defence to counter-claim - Judgment in default - Application to set aside after six months - Counsel's sworn affidavit - Whether acceptable.*

The plaintiff sued the defendant for breach of contract and claimed damages. A statement of defence and counter-claim was filed. As the plaintiff failed to file defence for the counter-claim, judgment in default was entered against the plaintiff. After a lapse of six months the plaintiff filed an application to set aside the judgment. He was asked to explain the delay for which his Counsel complied by filing a sworn affidavit. The defendant opposed the application. However, this was accepted by the Court.

Held:
The judgment in default to be set aside. The plaintiff be at liberty to defend the counter-claim within twenty-one days from the date of this order.

[Costs to be paid to defendant by the plaintiff.]

Legislation referred to:
Rules of the High Court 1980, O. 19 rr. 1, 8, 9

For the plaintiff - Abdul Razak Rouse; M/s. Rayner & Co.
For the defendant - Joseph Lee Henn Shen; M/s. Joseph Lee & Co.

JUDGMENT

Wan Mohamed J:

The plaintiff in this case, Ignatius P. Daim, sued the defendant, Syarikat Pemborong Willie Sdn. Bhd. for breach of agreement and damages for breach of contract. The defendant entered appearance and filed a Statement of Defence with a counter-claim. The plaintiff had failed to file the defence to the Counter-claim and judgment in default was then entered against the plaintiff in respect of the counter-claim under O. 19 r. 1 and 8, on 26 July 1980. The plaintiff, after a lapse of about six months, i.e. on 27 January 1981, filed an application to set aside the judgment entered in default of defence to the counter-claim under O. 19 r. 9. At the hearing of this application the Judge-in-Chambers ordered the applicant/plaintiff to explain the delay. This was complied with by the Counsel for applicant/plaintiff, Mr.Abdul Razak Rouse, by swearing a further affidavit dated 8 April 1982. The Counsel for respondent/ defendant opposed the application on three grounds, namely:

(1) The affidavit in support of the application was sworn by the Counsel for applicant/ plaintiff and not the applicant himself. Such an application should be ignored - citing Kota Kinabalu High Court Civil suit No. 577 of 1977 - where the Judge held that an affidavit must be sworn by the person who actually has knowledge of the facts to be sworn.

(2) The applicant/plaintiff failed to explain the delay in applying to set aside the judgment in default. It was held in the same civil suit quoted above that an application must be rejected if the applicant fails to explain the delay.

(3) No merit is shown in the affidavit in support of the application to the effect that applicant/plaintiff has good grounds of defence to the counter-claim.

Having perused through the affidavit in support of the application and further affidavit explaining the delay and also after hearing the arguments of the Counsels of both parties, I come to the following conclusions and findings:

(i) The claim and counter-claim in this case arose out of a contractual agreement between the parties to carry out certain building project. On going through the contractual agreement between the parties and the allegation of one party against another arising out of the said agreement, I find that all allegations require to be proved at the trial. This also applies to the counter-claim made by the respondent/defendant. I find that the applicant/plaintiff has grounds which would merit the issue of counter-claim to be heard at a trial.

(ii) The affidavit sworn by Counsel for applicant/plaintiff is acceptable to the Court as I find that he has the knowledge of the facts stated in the affidavit.

(iii) The delay in making the application to set aside the judgment in default was explained by the Counsel for applicant/plaintiff. However, I find that the Counsel for plaintiff is not without fault which resulted in the delay. For this I have to order costs to the respondent although the application of the plaintiff is allowed and I make the order in the following terms:

(a) That the judgment in default of defence to counter-claim entered herein and dated 26 July 1980, and the execution issued thereon be and is hereby set aside;

(b) That the plaintiff be at liberty to defend the counter-claim in this action by filing a reply and defence to counter-claim within twenty-one (21) days from the day of this order;

(c) That the costs of and incidental to this action in any event from date of judgment in default to the date of this order be taxed by the proper officer of the Court and be paid to the defendant by the plaintiff.

Also found at [1983] 1 CLJ 45